IN THE

United States
Circuit Court
of Appeals

FOR THE NINTH CIRCUIT

JOHN SWENDIG, JAMES W. MILLER, REMIGIUS GRAB, AND ANTHONY KERR,

Appellants.

—vs—

THE WASHINGTON WATER POWER COMPANY, a Corporation.

Appellee.

Brief for Appellants

On Appeal From the United States District Court for the District of Idaho, Northern Division.

JAMES F. AILSHIE,
RAY AGEE,
Coeur d'Alene, Idaho,
Solicitors for Appellants.

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STATEMENT OF CASE.

(Note: For convenience we will refer to *appellants* as *defendants* and to *appellee* as *plaintiff*. Italics herein are ours unless otherwise designated.)

There is no dispute as to the facts of this case. Prior to April 15, 1902, plaintiff filed an application with the

Department of the Interior for authority to construct a telephone line through and across the Coeur d'Alene Indian Reservation in the State of Idaho, which authority was granted by the Secretary on April 15, 1902, and crossed, among other lands, those of the defendants hereinafter described. This application was made and the authority granted pursuant to the Act of Congress, approved March 3, 1901. (31 Statutes at Large 1083). (Tr. 11,-12).

Prior to July 7, 1902, plaintiff filed an application, with the Department of the Interior, for a permit and permission to construct and maintain an Electric Power and Transmission line over said Reservation, which permit was granted by the Secretary on July 7, 1902, and crossed, among other lands, the lands now belonging to defendants. This application was made and permit granted under authority of the Act of Congress, approved February 15, 1901 (31 Statutes at Large 790). (Tr. 13).

Under the above mentioned authority from the Secretary of the Interior and during the year 1903, plaintiff constructed an electric power transmission line over and across said Reservation and the lands of defendants. About the same time plaintiff also constructed a telephone line across the Reservation, which latter line simply consisted of wires placed upon the poles of the power transmission line, and since that time plaintiff has continually maintained and operated both lines and

also a patrol road along the same. (Tr. 14-15). Although the telephone line has been constructed since 1903, it has never been used by anyone or for any purpose except by plaintiff in connection with and as an accessory to the Power Transmission line, and the same was constructed only for that purpose.

Subsequent to June 21, 1906, the Coeur d'Alene Indian Reservation was thrown open to settlement. On or about May 2, 1910, and after the opening of the Reservation defendant John Swendig, made a homestead filing upon the land described as the Northeast Quarter of Section 26; Township 47 North; Range 3 West of Boise Meridian, Idaho, and thereafter made final proof and on the 13th day of October, 1913, received a patent from the United States for such land. (Tr. 17). On or about the 7th day of May, 1910, defendant, Remigius Grab made a homestead filing upon the land described as the Northeast Quarter of Section 24; Township 47 North; Range 3 West of Boise Meridian, Idaho, and thereafter made final proof and on the 24th day of September, 1912 received a patent from the United States to said land. (Tr. 25). On or about the 4th day of May, 1910, defendant, James W. Miller, made a homestead filing upon the land described as the North Half of the Southwest quarter and the East Half of the Northwest quarter of Section 26; Township 47 North; Range 3 West of Boise Meridian, Idaho, and thereafter made final proof and on

the 23rd day of January, 1914, received a patent from the United States to the above described land. (Tr. 24). On or about the 22nd day of December, 1910, defendant, Anthony Kerr, made a homestead filing upon the land described as Lot 2, and the Southeast quarter of the Northwest quarter and the Southwest quarter of the Northeast quarter and the Northwest quarter of the Southeast quarter of Section 19; Township 47 North; Range 2 West of Boise Meridian, Idaho, and thereafter made final proof and on the 15th day of October, 1918, received a patent from the United States for this land. (Tr. 26).

Each patent to the above-described land is absolute on its face and makes no reservation, whatever, of plaintiff's pretended right of way, and under these absolute conveyances each defendant has at all times objected to the use of said right of way across his land on the ground that plaintiff has no permit or right to operate and maintain said lines thereacross.

Plaintiff brought separate action against each defendant for the purpose of securing an injunction and prays the court as follows:

> "That this court may issue its injunction perpetually enjoining and restraining the said defendant and all persons acting under his authority or pretending so to act, and all successors in interest of said defendant, from interfering with this plaintiff in operating and maintaining the said Electric Power Transmission line and said Telephone line and said patrol road over and across", the respect-

ive land of each defendant, "and from passing along and over the said patrol road".

The defendants each filed their motions in the trial court to dismiss the actions, on the ground that the complaint fails to state facts sufficient to constitute a cause of action. (Tr. 50). These motions were overruled by the trial court (Tr. 52), and the decision of the court was based upon the case of Washington Water Power Co. v. Harbaugh (253 Fed. 681),—a previous decision of the same court. The case went to trial, and documentary evidence and oral testimony was introduced, and the court thereupon entered a decree in favor of plaintiff as prayed for, and "perpetually enjoined and restrained (defendants) from interfering with the plaintiff in the operation and maintenance of the said electric power line", etc. (Tr. 75-80). Defendants thereupon prosecuted this appeal from the judgment.

SPECIFICATION OF ERRORS.

Defendants specify and assign the following errors:

I.

That the Court erred in holding that plaintiff's complaint states causes of action against each of these defendants, and in over-ruling and denying defendants' motion to dismiss said alleged causes of action.

II.

That the Court erred in holding and decreeing that the permit granted to plaintiff for a right of way across the lands of defendants, and each of them, for the construction and maintenance of an electric power transmission line is a valid and subsisting permit in force and effect since the issuance of patent.

III.

That the Court erred in holding and decreeing that plaintiff is entitled to maintain a roadway along the power transmission line described in the said decree.

IV.

That the Court erred in holding and decreeing that the title of these defendants, and each of them, to the lands described in the decree herein is subject to any rights of plaintiff.

V.

That the Court erred in holding and decreeing that these defendants must maintain gates for the use of plaintiff.

VI.

That the Court erred in holding and decreeing that plaintiff is the owner of a right of way and easement for a telephone line upon and across the respective lands of these defendants.

VII.

That the Court erred in admitting in evidence plaintiff's exhibit 14 and in considering and giving weight to the same for purpose of qualifying and varying the terms of the patents issued to defendants.

VIII.

That the Court committed error upon the whole record in holding that defendants were not entitled to the relief asked for in their various answers and in granting relief to plaintiffs.

IX.

That the Court erred in refusing to find, hold and decree that the issuance of patents to defendants by the Government was in law and effect a revocation of the prior permit issued by the Secretary of the Interior to plaintiff and that defendants took title freed from any and all burdens resulting from such permits.

ARGUMENT.

Specification of Errors.

I to VI, VIII and IX.

The foregoing specifications of error are so closely related, and all involving, as they do, the construction of the statute and defendants' patents, that we deem it best to consider and discuss them all together.

The language used in the Act of Congress of February 15, 1901, under which plaintiff received a permit to operate and maintain its Electric Power Transmission line, is unambiguous and too clear to admit of but one construction. It clearly states that the Secretary of Interior cannot grant, and a grantee cannot acquire, any interest whatever in the land across which the grantee acquires permission to maintain and operate electric power and transmission lines.

The statute involved reads in part as follows:

> "That the Secretary of the Interior be, and hereby is, authorized and empowered, *under general regulations to be fixed by him*, to permit the use of rights of way through the public lands * * * for electrical plants, poles, and lines for the generation and distribution of electrical power * * * to the extent of the ground occupied by such * * * * electrical or other works permitted hereunder * * * And provided further, that any permission given by the Secretary of the Interior under the provisions of this Act may be revoked by him or his successor in his discretion, and *shall not be held to confer any right, or easement or interest in, to or over any public land, reservation, or park*". (31 Stat. at L. 790).

As the grantee acquired no "*right*, or *easement*, or *interest in, to or over*" the land in question, and still had a right, under the permit granted by the Secretary of the Interior, to *operate and maintain* an Electric Power and Transmission line across the Coeur d'Alene Indian Reservation, then the permit, revocable at the option and in the discretion of the Secretary of the Interior, could be nothing greater than a mere *revocable license.* And furthermore, the plaintiff does not claim that it has any easement over the land in question, but does claim that it has the *right to operate and maintain said lines under the permit heretofore mentioned*, under the authority of the Land Department of the United States. In other words, the plaintiff claims that the permit, granted to it by the Secretary of the Interior, to operate and maintain its transmission line across the Coeur d'Alene Indian Reservation, is *still existing* and operative and that the authority gives it a *right to continue to operate* and maintain this transmission line over defendants' lands.

Now, as the plaintiff never had anything more than a mere revocable license to operate and maintain this line across the Coeur d'Alene Indian Reservation, its present rights must be construed and must depend upon the same construction as the rights of any other individual operating under a revocable license and its rights may be extinguished in the same manner and under the same condition as those of a *licensee under a private individual.* The plaintiff does not maintain, nor could it

successfully maintain, that the United States could not have revoked its permit at any time. The Land Department specifically reserved the right to cut off plaintiff's permit or license at its option.

Hence if the United States could revoke this permit or license at its option, then clearly any act on the part of the United States, which shows an intent to revoke such permit, or which is inconsistent with the continued existence thereof, must ipso facto revoke plaintiff's license to operate and maintain its transmission line.

There is, therefore, one decisive question involved in this case, and that is: Does the subsequent conveyance of land by the United States by a patent absolute on its face, ipso facto, revoke a permit issued by the Secretary of the Interior, under the authority of the Act of Feb. 15, 1901, for the construction of a Power Transmission line over such land at a time when it was in an Indian Reservation ?

It has been admitted by all concerned thus far in the case that any permit issued under the Act of February 15, 1901, is a mere *revocable license.*

ISSUANCE OF A PATENT REVOKES A LICENSE.

It is an elementary principal of law that in order for a license to exist, the licensor must have some right to or interest in the thing upon which the license is to operate and that when such right or interest of the licensor is extinguished, so also is the license extinguished. It is uniformly held that an absolute conveyance of land, ipso facto, revokes any license to the use thereof.

In the case of De Haro v. U. S., 5 Wall. 599, (18 L. E. 681) the Supreme Court of the United States lays down the rule in the following language:

> "There is a clear distinction between the effect of a license to enter land, uncoupled with an interest, and a grant. A grant passes some estate of greater or less degree, must be in writing, and is irrevocable, unless it contains words of revocation; whereas a license is a personal privilege, can be conferred by parol or in writing, conveys no estate or interest, and is revocable at the pleasure of the party making it. There are also other incidents attaching to a license. It is an authority to do a lawful act, which, without it, would be unlawful, and while it remains unrevoked is a justification for the acts which it authorizes to be done. It ceases with the death of either party and cannot be transferred or alienated by the licensee, because it is a personal matter, and *is limited to the original parties to it. A sale of the lands by the owner instantly works its revocation*, and in no sense is it property descendible to heirs. These are familiar and well established principles of law, hardly requiring a citation of authorities for their vindication; but if they are needed, they will be found collected in the notes to 2d Hare & Wallace's American Leading Cases, commencing on page 376. We are not aware of any difference between the civil and common law on this subject."

The author of the text in 18 Am. & Eng. Encyc. of Law, at page 1141 states the rule as follows:

> "As a license is terminated by *any act of the licensor which shows an intention to revoke it, a conveyance by the licensor of some interest in the land inconsistent with the continued enjoyment of the license operates as a revocation* even if the license was granted upon a consideration."

A great many authorities could be cited upon this question, all holding as the above, but as was said in the De Haro case, " These are familiar and well established principles of law, hardly requiring a citation of authorities for their vindication."

IT IS ALSO ESTABLISHED BY AN UNBROKEN LINE OF AUTHORITIES THAT WHEN A PATENT, ABSOLUTE UPON ITS FACE, HAS BEEN ISSUED BY THE LAND DEPARTMENT AND DELIVERED AND ACCEPTED BY THE PATENTEE, THE TITLE OF THE UNITED STATES GOES WITH IT AND ALL RIGHT TO CONTROL THE TITLE OR LAND OR TO DECIDE ON THE RIGHT TO THE TITLE HAS PASSED FROM THE LAND OFFICE AND FROM THE EXECUTIVE DEPARTMENT OF THE GOVERNMENT.

22 R. C. L., page 275, Par. 37.

United States v. Carl Schurz, 12 Otto, 378; 26 U. S. (L. E.) 167.

Moore v. Robbins, 6 Otto 530; 24 U. S. (L. E.) 848.

Iron Silver Mining Company v. Campbell, 135 U. S. 286; 34 U. S. (L. E.) 155.

Stone v. United States, 2 Wall. 525; 17 U. S. (L. E.) 765.

In United States v. Schurz (Supra) the court says:

> "From the very nature of the functions performed by these officers (speaking of the officers of

the Land Department) and from the fact that a transfer of the title from the United States to another owner follows their favorable action, it must result that at some stage or other of the proceedings *their authority in the matter ceases.*

"It is equally clear that this period is, at the latest, precisely when the last act in the series essential to the transfer of the title has been performed. Whenever this takes place, the land has ceased to be the land of the Government; or, to speak in technical language, the legal title has passed from the Government and the power of these officers to deal with it has also passed away."

In Moore v. Robbins, (supra) the court says:

"While conceding for the present, to the fullest extent, that when there is a question of contested right between private parties to receive from the United States a patent for any part of the public land, it belongs to the head of the Land Department to decide that question, it is equally clear that *when the patent has been awarded to one of the contestants* and has been issued, delivered and accepted, *all right to control the title or to decide on the right to the title has passed from the Land Office. Not only has it passed from the Land Office, but it has passed from the Executive Department of the Government.* A moment's consideration will show that this must, in the nature of things, be so. We are speaking now of a case in which the officers of the Department have acted within the scope of their authority. The offices of register and receiver and commissioner are created mainly for the purpose of supervising the sales of the public lands; and it is a part of their daily business to decide when a party has by purchase, by pre-emption or by any other recognized mode, established a right to receive from the government a title to any part of the public domain. This decision is subject to an appeal to the secretary, if taken in time. But if no such appeal be taken, and the patent issued under the seal of the United States, and signed by the

President, is delivered to and accepted by the party, the title of the government passes with this delivery. *With the title passes away all authority or control of the Executive Department over the land, and over the title which it has conveyed.* * * * But in all this there is no place for the further control of the Executive Department over the title. *The functions of that department necessarily cease when the title has passed from the government.* And the title does so pass in every instance, where, under the decisions of the officers having authority in the matter, a conveyance, generally called a patent, has been signed by the President, sealed and delivered to and accepted by the grantee".

Then, under the established principles of the law, as shown by the above authorities, at the time that the Land Department issued the patents to these defendants, it conveyed all the interest of the United States, and all the right of the Executive Department of the government to exercise any control or authority over the title or land passed by these grants. There are, therefore, two reasons why the plaintiff's right to maintain and operate its electric power transmission line over the lands in question was necessarily extinguished:

First, the conveyance of an absolute title to defendants clearly showed an intent on the part of the Land Department to revoke this permit or license, and we think did revoke said permit or license, and second, even if the Land Department did not intend to so extinguish the rights of plaintiff, it placed all control and authority over the lands now belonging to defendants *out of its power when the patents were granted*, and the Executive

Department of the government has no interest in the land whatever, *there is nothing belonging to the government upon which a license or permit by the Land Department can operate*, and the law makes no provision for the operation of a license when the licensor has no interest upon which the license can operate.

It seems self-evident that the grants of the government to defendants had the legal effect of *either revoking the permit of plaintiff, or else transferred to defendants the right to revoke it.* Certainly the United States as grantor *reserved no right or power to either revoke* the permit *as to these lands* or to further *regulate* or *control* it over these tracts of land. If the Government cannot revoke it, and the defendants cannot revoke it, then it must have *by some process become a vested right*, and plaintiff has secured a perpetual right to operate and maintain its lines across a great many miles of land, similarly situated to that of these defendants *for nothing*, and now alleges that its permanent right under the permit is worth $25,000.00. (Tr. 14).

RIGHT OF EMINENT DOMAIN REQUIRES PAYMENT OF JUST COMPENSATION.

The construction by plaintiff of its transmission line at large expense, with the knowledge that it was doing so under a *license* and that it had *no easement* therefor, gives it no legal right now to assert in court that its license should be made permanent by judicial decree; neither does the revocation of its license by the issuance of patent impair any vested right or destroy any of its property or invested capital.

By the provisions of Sec. 14, Art. I of the Constitution of Idaho, and Sec. 7404 Idaho Compiled Statutes, Subdiv. 6; and Hollister v. State, 9 Ida. 8, and other cases, plaintiff has the *right of eminent domain.*

It is perfectly clear that if the contention of the defendants is correct it will be necessary for plaintiff to at once *purchase* an easement or else *condemn* it in accordance with the statutes of Idaho and pay "*just compensation*" for its right of way. Of course it is self-evident that the thing plaintiff is trying to avoid is the *payment* of "just compensation" *for the easement it seeks to perpetually enjoy.*

REGULATION OF THE LAND DEPARTMENT AND RIGHTS OF DEFENDANTS THEREUNDER.

Prior to and at the time these lands were thrown open to entry in May, 1910, the rules and regulations of the Land Department provided that the issuance of a

patent to lands covered by an outstanding permit under this statute revoked the permit. Paragraph 11 of the then governing regulations (31 L. D. 17) provided inter alia:

> "The final disposal by the United States of any tract traversed by the permitted right of way is of itself, without further act on the part of the Department, a revocation of the permission so far as it affects that tract, and any permission granted hereunder is also subject to such further and future regulations as may be adopted by the Department."

The foregoing provision was in effect until the 24th day of August, 1912, when it was supplanted by a regulation providing that the subsequent conveyance of the land should not revoke the permits outstanding under this statute. Paragraph 9 of the regulations issued Aug. ust, 24, 1912 (41 L. D. 152) is as follows:

> "The final disposal by the United States of any tract traversed by a right of way permitted under this act shall not be construed to be a revocation of such permission in whole or in part, but such final disposal shall be deemed and taken to be subject to such right of way until such permission shall have been specifically revoked in accordance with the provisions of said act. (Secretary to Commissioner of General Land Office, Aug. 23, 1912)."

The foregoing provisions establish the fact that at the time the Coeur d'Alene Indian Reservation was thrown open to settlement, the regulations of the Land Department provided that a patent issued to a settler would revoke any permit outstanding on the land under this statute. This regulation was in effect at the time

each of these defendants made homestead entry upon their respective lands (Tr. 17, 24, 25, 26). It was also in effect when Grab made final proof June 24, 1912 (Tr. 24). The Land Department changed these regulations in August, 1912, but even if the Land Department did have authority or power to change the construction of this statute, which we urge it *did not*, it could not do so in any manner to affect the rights of these defendants which were initiated and date from the time of their entry of the land in 1910, when the regulation for cancellation was in effect.

ENTRY BY A SETTLER UPON PUBLIC LAND AND THE RECEIPT OF A CERTIFICATE OF ENTRY FROM THE LAND DEPARTMENT INSTANTLY SEGREGATES SUCH LAND FROM THE PUBLIC DOMAIN AND WHEN PATENT SUBSEQUENTLY ISSUES IT TAKES EFFECT AS OF THE DATE OF SUCH ENTRY.

In the case of Witherspoon v. Duncan, 4 Wall. 210 (18 L. E. 339), the Supreme Court of the United States used the following language:

> "In no just sense can lands be said to be public lands after they have been entered at the land office and a certificate of entry obtained. If public lands before the entry, after it they are private property. If subject to sale, the government has no power to revoke the entry and withhold the patent. A second sale, if the first was authorized by law, confers no right on the buyer, and is a void act.
>
> "According to the well-known mode of proceeding at the land offices (established for the mutual convenience of buyer and seller), if the party is entitled by law to enter the land, the receiver gives him a certificate of entry reciting the facts, by means of

> which, in due time, he receives a patent . The contract of purchase is complete when the certificate of entry is executed and delivered, and thereafter the land ceases to be a part of the public domain''.

To the same effect see:

Wirth v. Branson, 98 U. S. 118, 25 L. E. 86;
Cornelius v. Kissell, 128 U. S. 456, 32 L. E. 482.

Clearly under the foregoing authorities, even if the Land Department had the power or authority to *misinterpret the Act of Congress* and make such regulations, they would in nowise affect the previously initiated rights of these defendants. Their rights were established in 1910 when they made entry on this land. Any act subsequent thereto tending to change or alter such rights would be in excess of jurisdiction and void. It would be depriving these defendants of their property without due process of law. Under the regulation in effect at the date of their entry upon this land, defendants had a right to believe that the subsequent issuance of patents to them would revoke the permit of plaintiff and would give defendants title to all the land which they had purchased free from any burden of plaintiff's power line.

This identical question came up before the Land Department in a case wherein plaintiff here was also a party. The case is entitled John A. Nye et al. v. Washington Water Power Co., and the opinion (Defendants' Ex. 5) was written by the present Secretary, Hon. Albert B. Fall. In this opinion the Secretary, after quoting the regulation in effect in 1910, used the following language:

> *"Settlers, or entrymen, were therefore warranted in believing that when they had complied with the law and patent had issued, the prior permit or license granted would terminate as to the lands so patented."*

With such regulation in effect when these defendants made their respective homestead entries, and paid for this land, it would violate every principle of equity and justice to permit the regulation, dated August 24, 1912, to be effective as against them if it should be conceded that the Department had the authority to promulgate such a rule. They are the purchasers of this land and as Secretary Fall said,

> "were therefore warranted in believing that when they had complied with the law and patent had issued, the prior permit or license granted would terminate as to the lands so patented."

This regulation of 1912, if effective, would deprive them of part of that which they had purchased, which would not seem to be either justice or law.

On first blush it might seem that to hold that the subsequent conveyance of these lands to defendants revoked plaintiff's permit would work a hardship upon plaintiff in view of the fact that it has expended quite an amount of money in constructing this power line. However, even if such revocation would work a hardship upon plaintiff we fail to see how that would give plaintiff any right as against these defendants, who are bona fide purchasers of this land from the United States.

MERE OCCUPATION AND IMPROVEMENT ON PUBLIC LAND DOES NOT CONFER A VESTED RIGHT IN THE LAND SO OCCUPIED, NO MATTER HOW LONG THE OCCUPATION NOR HOW LARGE THE IMPROVEMENTS, SO THAT THE OCCUPANT CAN MAINTAIN A RIGHT OF POSSESSION AGAINST THE UNITED STATES OR THE GRANTEE OF THE UNITED STATES

In the case of Northern Pacific Railway Co. v. Smith, 171 U. S. 260; 43 L. E. 157, the Supreme Court of the United States had under consideration a question arising out of a settlement upon public land with the view of locating a townsite thereon. The party had already built houses on the particular property, but had made no application to the Land Department. Later the land in question was granted to defendant railroad company. The court in deciding that case used the following language:

> "It has frequently been decided by this court that mere *occupation and improvement* on the public lands, with a view to pre-emption, *do not confer a vested right in the land so occupied*; that the power of Congress over the public lands, as conferred by the constitution, *can only be restrained by the courts in cases where the land has ceased to be government property* by reason of a *right vested in some person or corporation*, that such a vested right, under the pre-emption laws, is only obtained when the purchase money has been paid, and the receipt of the proper land officer given to the purchasers. If then, one seeking to appropriate to himself a portion of the public lands cannot, *no matter how long his occupation or how large his improvements*, maintain a right of possession against the United States or their *grantees*, unless he has by entry and payment of purchase money, *created in himself a vested right*, is one who claims under a town-site grant in any better position?"

In the case of Johnson v. Drew, 171 U. S. 94; 43 L. E. 88, the Supreme Court of the United States said:

> "It being so a part of the public domain, subject to the administration by the Land Department and to disposal in the ordinary way, the question arises whether a party *can defend against a patent duly issued therefor upon an entry made in the local land office on the ground that he was in actual possession of the land* at the time of the issue of the patent? *We are of the opinion that he cannot.* It appears from the testimony that the defendant, *although in occupation of this land*, as he says, from 1871, never attempted to make any entry in the local land office, never took any steps to secure a title, and in fact did nothing until after the issue of a patent, when he began to make inquiry as to his supposed rights."

To the same effect see:

Frisbie v. Whitney, 76 U. S. 187; 19 L. E. 668.
Gonzales v. French, 164 U. S. 339; 41 L. E. 458.
Hutchings v. Low, 82 U. S. 77; 21 L. E. 82.
Steel v. St. Louis Smelting & Refin. Co., 106 U. S. 447; 27 L. E. 226.

In the present case plaintiff does not claim any vested right in this land by means of any grant or conveyance, and there is no showing that it ever attempted to or took any steps to acquire title to or an easement for this right of way, although it had notice that defendants were purchasing it, and under the above authorities, it is clear that plaintiff's mere occupancy and construction of its power line across this land did not give it any right against the United States and does not give it any right against these defendants, who are bona fide purchasers from the United States.

And certainly this is not a situation wherein plaintiff could claim any right on the ground of estoppel, because it had spent money on this right of way.

THE PRINCIPLE THAT ONE SHOULD BE ESTOPPED FROM ASSERTING A RIGHT TO PROPERTY UPON WHICH HE HAS, BY HIS CONDUCT, MISLED ANOTHER CANNOT BE INVOKED AGAINST THE UNITED STATES, OR BY ONE WHO, AT THE TIME THE IMPROVEMENTS WERE MADE, WAS ACQUAINTED WITH THE TRUE CHARACTER OF HIS TITLE OR WITH THE FACT THAT HE HAD NONE.

In the case of Steel v. St. Louis Smelting & Refining Co., 106 U. S. 447; 27 L. E. 226, the Supreme Court had under consideration a state of facts wherein plaintiff had acquired a mineral patent to lands claimed by defendant under a conveyance as part of a town site on the public domain. Plaintiff set up its title and defendant alledged the foregoing fact showing that the land had been occupied as a townsite for more than nineteen years prior to the patent of plaintiff; that the plaintiff's assignor had lived in the town for nineteen years and was cognizant of the fact that large amounts of money had been expended by defendant and was being expended by defendant, amounting to over $5,000.00, and had never made any objection thereto nor informed defendant of his rights. Demurrer to this answer was sustained by the lower court and in considering the question, the Supreme Court said:

"These allegations are very far from establishing such an equity in the defendants as to estop the

patentee and those claiming under him, from asserting the legal title to the premises. These matters could not operate to estop the government in any disposition of the land it might choose to make. Its power of alienation could not be affected until the defendants had performed all the acts required by law to acquire a *vested interest in the land*, and it is not pretended that they took any steps to secure such an interest. Whatever right, therefore, the government possessed, to use or dispose of the property, freed from any claim of the defendants, it could pass on to its grantee.

"The principle invoked is, that one should be estopped from asserting a right to property upon which he has, by his conduct, misled another, who supposed himself to be the owner, to make expenditures. It is often applied where one owning an estate, stands by and sees another erect improvements on it, in the belief that he has the title or an interest in it, and does not interfere to prevent the work, or inform the party of his own title. There is in such conduct a manifest intention to deceive, or such gross negligence as to amount to constructive fraud. The owner, therefore, in such a case, will not be permitted afterwards to assert his title and recover the property, at least without making compensation for the improvements. But this salutary principle cannot be invoked by one who, at the time the improvements were made, was acquainted with the true character of his own title or with the fact that he had none".

See also:

Henshaw v. Bissell, 85 U. S. 255; 21 L. E. 835.
Brant v. The Virginia Coal & Iron Co., 93 U. S. 326; 23 L. E. 927.

In this case there is not a scintilla of showing that would even tend to establish estoppel. Plaintiff knew at the time it was constructing its line over this land that it did not have any interest therein and *it further knew that*

a subsequent patent to such land would cut off the permit under which it was operating. With knowledge of these facts it went ahead and built its line.

However, as heretofore observed, to hold that plaintiff now has no right to operate and maintain its power line across defendants' lands will not work a hardship on plaintiff but will only compel it to pay "just compensation" for this privilege. The evidence shows that plaintiff only paid the sum of $224.00 for the right to construct and maintain its *telephone line across the entire Coeur d'Alene Indian Reservation* (Tr. 12) and that it *did not pay a single cent for the permit* for its power line right of way privileges which it now claims to be worth more than $30,000.00. (Tr. 14-15). Plaintiff has been using this right of way since 1903, a period of time extending over more than eighteen years and has not paid a single cent in excess of the $224.00 for this privilege. (Tr.14-15). Is it either equitable or just that plaintiff should enjoy these great privileges without paying for them? The answer is obvious.

PLAINTIFF'S TELEPHONE LINE.

What has been said relative to plaintiff's power transmission line applies with equal force to its telephone line. While plaintiff claims the right to operate and maintain this telephone line pursuant to a permit or grant under the provisions of the Act of March 3, 1901, (31 Stat. at Large 1083), an examination of this act clear-

ly shows that plaintiff could not acquire the right asserted here under said act and that the Secretary of the Interior was without jurisdiction or authority to issue or grant such right in view of the facts that existed. In the first place, it is conceded that this application was made and the telephone line constructed and is maintained for *plaintiff's use only*, and that the same is in *no sense maintained for the benefit of the public at large* and is used only as an accessory or incident to plaintiff's *power transmission line.* The Act of March 3, 1901 (31 Stat. at Large 1083) applies only to telephone lines operated *for the use and benefit of the public at large*, where the company operating the same is doing so *as a business and charges tolls* and not for its own private use as an accessory to some other business. This is shown from the wording of the Statute itself. The portion of the statute pertinent reads as follows:

> "The Secreary of the interior is hereby authorized and empowered to grant a right of way, in the nature of an easement, for the construction, operation, and maintenance of telephone and telegraph lines and *offices for general telephone and telegraph business* through any Indian Reservation * * * *and Congress hereby expressly reserves the right to regulate the tolls or charges for the transmission of messages* over any lines constructed under the provisions of this Act."

The above quoted language is so clear as to the purpose of the law that further discussion seems unnecessary. In view of the foregoing provisions of the act it seems clear that the plaintiff could not and did not acquire any right under the Act of March 3, 1901 (31 St. at Large 1083)

and that the so-called grant for a right of way for a telephone line was wholly ineffective and void.

It would appear, therefore, that if plaintiff is authorized to operate and maintain this telephone line at all, it must do so under the permit granted pursuant to the Act of February 15, 1901 for its right of way for the power transmission line and as an accessory to such transmission line, and the right of way for the telephone line must stand or fall with the permit for the power transmission line.

SPECIFICATION OF ERROR NO. VII.

This assignment of error is made in order to call the attention of the court to the character of evidence relied on by the trial court in holding defendants' patent subject to the permit granted plaintiff. This was a letter written by the Secretary of the Interior to the Commissioner of the Land Office, dated August 23, 1912 (Tr. 69). We objected to this evidence and we think the objection well taken. The use of this evidence by the plaintiff to assail defendants' title *is a collateral attack upon the patent.* As will be seen in the discussion hereinafter of the Harbaugh case, the trial court placed great reliance and stress *on this particular letter* and allowed it to carry more weight than defendants' patent when it came to determining *whether defendant took title encumbered with this right of way.*

It is only necessary to mention the fact to this court

that in a controversy between two litigants, who each claim to have acquired rights from the government, neither one can set up or assert any mistake, inadvertence or private regulations or understanding by or on the part of the Government in making the grant. Such question can only be raised on a *direct* attack by the Government.

OPINION IN WASHINGTON WATER POWER COMPANY V. HARBAUGH, 253 FED. 681, UNSOUND, AND IN EFFECT A REFORMATION OF PATENT ON A COLLATERAL ATTACK.

So far as we have been able to discover, the U. S. District Court for the District of Idaho is the only court that has ever passed directly on the question before this court in the present case. In the Harbaugh case above cited, the trial judge filed an opinion which has been reported and was followed by the same court in this case. It is apparent, we think, that the opinion in the reported case is founded on erroneous assumptions of both law and fact.

In the first place, the court is forced to admit that,

> "the right acquired for the maintenance of a power line was in the nature only of a permit or license revocable at the will of the Secretary of the Interior."

It certainly could not be more in the face of the command of Congress,

> "* * * any permit given by the Secretary of the

> Interior under the provision of this Act * * * *shall not be held to confer any right, or easement or interest in, to or* over any public land, reservation or park * * * .'' (31 St. at Large, 790).

The court then proceeded, however, to discuss and treat this ''revocable license'' as something ''superior to the rights of the subsequent patentee of the land,'' and quoted from a letter of an administrative officers who refers to the interest acquired by such a license as ''*the title of the permittee*''. The quotation adopted by the court from the letter of the Secretary of the Interior says inter alia:

> ''The rule of private real property law under which such a license is revoked by the transfer of the fee-simple title has no application to either the legal or the economic data with which Congress was dealing in this legislation, and therefore the intent to enact the said rule should not be imputed to Congress in the absence of clear implication of such intent.''

Now we ask: What could be a more ''*clear implication of such intent*'' than the following plain, straightforward English with which the Act closes?

> ''*And provided further*, that any permission given by the Secretary * * * *shall not be held to confer any right, or easement or interest in, to or over any public land, reservation or park*''.

The court then proceeded to characterize the Congressional Act as ''*a doubtful statute*'' and thereupon calls to his aid the letter of the Secretary as a ''*practical construction * * * by a high administrative officer*'', and con-

cludes that the unqualified fee simple patent from the Government "*did not revoke the plaintiff's license*".

The opinion then assumes, without any basis therefor, that it had been the intention of the Department to note a reservation of this license in the patent and that the failure was an "*inadvertence*" or the result of "*carelessness on the part of some subordinate officer or employee*".

Notwithstanding these considerations, the court evidently did not feel entirely secure in his reasoning or conclusions, so he charges the defendant with notice of "*plaintiff's right*" and holds him, in effect, estopped to assert the full right granted by his patent. Upon this point it is well to quote the court in full. He says:

> "It is hardly possible to contend that the defendant was *in any wise misled to his injury.* Admittedly he knew that the plaintiff was maintaining and operating the transmission line, and *so far as appears* he was willing to purchase the property subject to such right as it then had. When he made his offer he had no assurance or intimation that a patent would be issued without a notation referring to the right of way. Accordingly it is held that *neither the integrity nor the extent of the plaintiff's right* was affected by the issuance of the patent."

Was it not just as reasonable, and more in keeping with the established rules of law and practice, for the homesteader to suppose that after advertising to prove up on his homestead, any one who claimed a superior or adverse right in the land would appear and make his protest and that any mere *revocable* license held by any one

would be terminated upon the issuance of patent? *Why* should the homesteader suppose or have reason to believe for a moment that the *uniform and well established* rule of law *that a conveyance of the fee* title revokes a license would or could be set aside or disregarded in his case? Can a court say that the homesteader would have taken this tract of land had he been apprised that this *license* would be construed to be in *effect an easement*? *Why* should the homesteader suppose for a moment that any reservations not directed or required by law would be made in his patent? And if none was made, why should he suppose the omission was a *mistake* or an inadvertence?

The second branch of the opinion, dealing with the width and extent of the Company's *easement* or *right of way*, drove the court to the necessity of doing by judicial decree what neither Congress nor the Interior Department had attempted to do, by either legislative or executive action, viz.: Specify the *manner of enclosure and mode of use* of this *license or permit right* which has thus ripened into a *permanent easement* over the defendant's land for which he holds a fee simple patent from the United States.

We most respectfully submit that the judgment and decree of the trial court should be reversed and the cause should be remanded with instructions to the lower court to dismiss plaintiff's actions against defendants

and that defendants recover their costs.

Respectfully submitted,

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